



Context: Overview of Public-Private Partnerships (P3s)

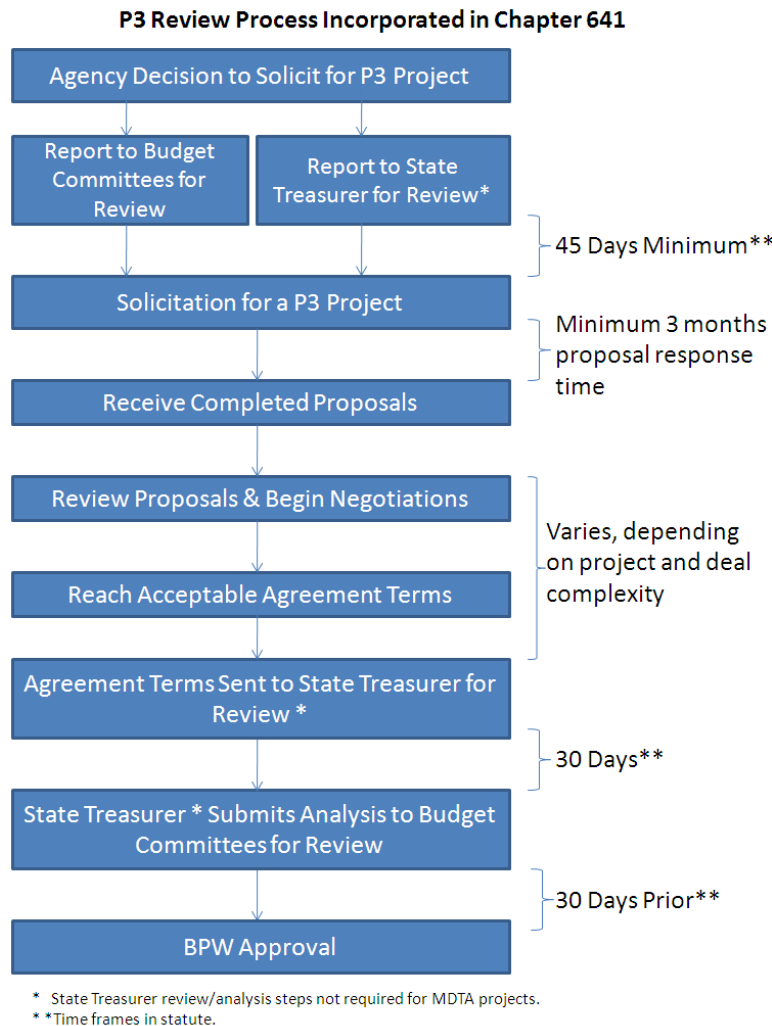
Given the financial challenges facing transportation in Maryland, partnerships are a viable alternative to creatively infuse additional dollars into transportation investments. P3s, increasingly used across the United States, refer to contractual agreements formed between a public agency and private sector entity that allow for greater private sector participation in the delivery of transportation projects. Traditionally in Maryland, with a few notable exceptions, private sector participation has been limited to separate planning, design, or construction contracts on a fee-for-service basis—based on the public agency’s specifications. Expanding the private sector role could allow public agencies in Maryland to tap private sector technical, management, and financial resources in new ways to achieve public objectives such as greater cost and schedule certainty, supplementing in-house staff, innovative technology applications, specialized expertise, and access to private capital. To make these P3 projects work in Maryland, the P3 process needs to be fast, efficient, and predictable.

P3s can provide benefits by allocating responsibilities to the party—either public or private—that is best positioned to control the activity in a manner that produces the desired result and does so most efficiently and cost-effectively. Under the right conditions, P3s have the potential to provide a wide array of benefits beyond risk sharing, including application of advanced construction techniques, operational efficiencies, and access to an expanded set of financing sources. P3s do not, however, generally eliminate the need for an underlying revenue source, either conventional state and federal sources or alternative mechanisms such as tolls or other user fee mechanisms.

Maryland does not have a single, centralized enabling statute expressly authorizing transportation P3s. Instead, an often confusing collection of overlapping laws, regulations, and opinions guides the implementation of transportation P3s in Maryland. Maryland established by regulation a Transportation Public-Private Partnerships Program (TP3) for non-highway projects (Code of Maryland Regs §§11.07.06.01 to 14 and Md. PPP Guidance), and under the statutory authority of sections 4-205 and 4-312 of the Transportation Article. A 1996 state attorney general opinion also states that the Maryland Transportation Authority (MDTA) is authorized to enter into P3s for toll highways under these and other provisions (MD 81 Op. Attorney Gen. 261, issued 2/2/96). State statute now implicitly acknowledges this interpretation by addressing oversight and reporting requirements for transportation P3s, including tolled projects (Md. Transportation Code Ann. §4-406).

While MDOT does have the authority to enter into P3s, lease agreements specifically are subject to approval by the Board of Public Works (Md. Transportation Code Ann. §4-406(f)). During the P3 evaluation and implementation process, MDOT is also required to submit several reports for review and comment to the Senate Budget and Taxation Committee, the House Committee on Ways and Means, the House Appropriations Committee and/or the Department of Legislative Services. (Transportation Code Ann. §4-205 and §4-406—the latter under legislation enacted in 2010 [Senate Bill 979 and House Bill 1370; 2010 Md. Laws, Chap. 640 and Chap. 641]). The Board of Public Works is not authorized to approve a P3 agreement until the budget committees have had 30 days to review and comment on the required analysis reports.

A simplified illustration of the current review process is shown below.



While the current P3 process allows for flexibility, it also has the potential to create a high level of uncertainty for the State's private partners, especially in terms of timing. Such uncertainty could deter private sector interest in future partnerships. A clear and streamlined process, while retaining a certain degree of flexibility, is required to have competitive and timely negotiations.

Preliminary Recommendations:

The following preliminary recommendations are made with regard to potential expansion of the use of partnership mechanisms.

(1) Recommendation 1: Establish Centralized Enabling Legislation for P3s. While MDOT does have the authority to enter into transportation P3s, the State does not yet have a formal, comprehensive P3 enabling legislation. Such enabling legislation should be enacted to clearly promote a balanced approach to transportation P3s throughout the State and serve as the primary, centralized reference for transportation P3 statutory requirements. This enabling legislation need not be limited to transportation and may be extended to other forms of public infrastructure as deemed necessary. It should be relatively high level in scope, recognizing that

each State agency will likely develop more detailed process and implementation regulations to meet their specific infrastructure development needs. This enabling legislation should include the following key components:

- a. Retain existing definition of P3s but add key distinctions between different types.** P3s are defined in Chapter 641 of the Acts of Maryland, 2010 as “a sale or lease agreement between a unit of State government and a private entity under which the private entity assumes control of the operation and maintenance of an existing State facility; or the private entity constructs, reconstructs, finances, or operates a State facility or a facility for State use and will collect fees, charges, rents, or tolls for the use of the facility.” This general definition is reasonable and should be retained in any future enabling legislation; however, distinctions between different types of P3s should be useful in recognizing that there tends to be a spectrum of public and private relationships. For instance, some proposed P3s may have a more significant impact on State debt, revenues, or budget and would be evaluated accordingly. Other P3 proposals may have a lesser impact on the State, thus requiring a streamlined, less onerous review process.
- b. Present a clear statement of motives with respect to P3s.** Any enabling legislation should clearly outline the reasons for enabling P3s in the State. Such justification should include but is not limited to:
 - Importance of sufficient quality public infrastructure to the State’s economic, social, and environmental well-being
 - Increasing budget pressures and related challenges to the sufficient provision and maintenance of public infrastructure
 - Numerous and growing unfunded infrastructure project needs
 - Ability to enhance provision of sufficient quality public infrastructure on a timely basis
- c. Present a clear statement of expected/required benefits with respect to P3s.** P3s should only be sought when the combination of benefits outweighs the additional implementation burdens. Potential benefits include:
 - Expedited project completion
 - Cost savings
 - Risk transfer to private parties
 - Net new revenue, including via financing backed by user fees for all or a portion of capital construction costs
 - State-of-the art techniques for project development and/or operation
 - Efficiency of operations and maintenance via innovative management techniques
 - Expertise in accessing and organizing the widest range of financial resources, including but not limited to new sources of private capital
- d. Clearly outline an effective legislative review process.** Enabling legislation should indicate whether reviews are needed for specific stages in the process and the appropriate timeline for report submission and response. Legislative review should be required at specific points, including prior to issuing a notice of solicitation and prior to final Board of Public Works approval. However, excessive time spent on reviews, especially near the latter stages of the negotiations process, could negatively impact the value of the P3 to the State and would be perceived as a deterrent by the private sector. After successful negotiations

have been achieved, it is typically in the best interest of all parties to finalize agreements and any necessary transactions as quickly as possible.

For any of the designated review periods, the permitted period of time for response should be clearly indicated. Time periods could vary depending on the specific review stage. While a 45 day review period may be reasonable early in the solicitation process, a shorter review period, perhaps lasting no more than 10 days, is more appropriate during the latter negotiations stages. If the requested response is not provided before the end of the designated review period, implicit support has been provided enabling the P3 process to continue onward. Key review periods should be established as maximum amounts of time allowed for review, not minimums.

The number of parties participating in the review process should be kept to a manageable number. Currently, the Senate Budget and Taxation Committee, the House Committee on Ways and Means, the House Appropriations Committee, and the Department of Legislative Services all serve important roles in the reviews process. Additional review requirements could hinder timely completion of beneficial P3 arrangements.

- e. **Set firm guidelines for confidentiality and public disclosure.** Protection of proprietary information should be a core component of P3 enabling legislation. A private partner may indicate certain information as confidential and establish boundaries for the release or disclosure of key information, especially in the time period prior to contract award.
- f. **Establish clear parameters for P3 evaluation framework and agreement structures.** Key parameters should be established for evaluating P3s, while maintaining flexibility for each P3 to be independently negotiated. MDOT has identified the following parameters where specific policy direction would be beneficial to the State:
 - **Set Maximum Terms and Potential Exceptions.** Any mandated maximum term should be long-range to allow the flexibility needed to set a term length that reflects the economics of the project. For instance, P3 contracts should be limited to 50 year term lengths, with extensions subject to legislative approval.
 - **Non-Compete Clauses.** P3 agreements should prohibit a private partner from hindering the development or construction of any potentially competing facility that was planned at the time the agreement was executed. This essentially prohibits most non-compete measures. However, an agreement may provide for reasonable compensation to the private partner for adverse effects on revenues resulting from the development or construction of a then-unplanned facility.
 - **Proprietary Information and Trade Secrets.** Protection of proprietary information and trade secrets is critical to the private sector. The review and ongoing oversight process should be designed to fully protect the confidentiality of sensitive private sector information.
 - **Potential State Revenue Sharing When Applicable.** All forms of revenue sharing, either by upfront payments for the rights, a share of the ongoing revenue stream, or a share in the excess net (or gross) income over certain targets, should be explored in every P3 project. The economic variables of the transaction will ultimately determine the most feasible combination of options.
 - **Use of Proceeds.** Proceeds from P3 agreements should be dedicated to whichever State fund revenues from the project would have originally gone to (i.e., revenues from a P3 contract for a transportation project should be dedicated to transportation).

- **Comprehensive Contract Conditions Regarding Future Fees or Rate Adjustments.** P3 agreements should contain comprehensive contract conditions regarding future fee or rate adjustments, although the specific methodology should offer flexibility on a per-project basis.
- **Managing State Debt Exposure While Maintaining Ability to Include State Funds or Debt.** The option of State funds or debt mechanisms should be available for use in P3 projects. They may be advantageous for specific projects to achieve the most cost-effective financing needed for a successful project. This should be done in a manner that insulates the State and limits obligation for debt repayment to the private entity.
- **Oversight, reporting and performance measurement requirements.** Ongoing contract oversight, reporting and performance measurement is crucial for successful P3 project implementation. Provisions for these could be included in all P3 agreements.
- **Provisions for Ongoing Maintenance by Private Contractor.** P3 agreements should include provisions for ongoing maintenance of the facility. Generally, that maintenance should be the responsibility of the private contractor, with the potential for the State to perform maintenance activities on a reimbursable basis.
- **Remedies in Case of Default.** All P3 agreements should include remedies in case of default. Such Remedies would be tailored to each transaction and would not be predetermined by policy or statute.

(2) Recommendation 2: Review and Revise Existing TP3 Process. Since the establishment of the TP3 program in 1997, any Maryland transportation agency could consider unsolicited proposals and engage in the formation of a P3. However, one exception was noted - no agency could accept unsolicited proposals for a P3 related to highway infrastructure. Although this exception still holds true, it has been recognized that the use of P3s nationally to provide citizens with needed highway projects is growing. Other states do accept unsolicited highway P3 proposals and MDOT has made a concerted effort to understand how this is implemented, including publishing a study on current practices in highway P3s. However, this has not resulted in an elimination of the restriction on unsolicited highway P3 proposals. At the same time, it has been found that the existing TP3 process does not provide the most effective framework for evaluating and implementing a wide range of transportation P3 projects. MDOT should further evaluate its current TP3 process, taking input from stakeholders into consideration, and adjust as necessary to allow the program to most effectively meet the State's infrastructure finance needs.

(3) Recommendation 3: Identify Future P3 Opportunities and Integrate P3 Screening Analysis into Existing Transportation Decision-making Process. P3s should be considered beginning in the early stages of a transportation project's development. This would support a more comprehensive, programmatic approach to P3s. MDOT should incorporate an analysis of the benefit of utilizing P3s for project implementation and delivery throughout the phases of project development to determine applicability. In addition to expanding the potential for P3s to highway projects, P3s should be considered for a broad range of project types including, but not limited to:

1. Transit (bus and rail)
 - Transit stations and associated parking (lots and garages)
 - Transit maintenance facilities
2. Port
 - Terminal/berth facilities, with Seagirt as an example
3. Aviation

- Air cargo facilities
- Parking and shuttle networks
- 4. General
 - IT Systems
 - Other real estate/joint development opportunities

An ongoing list of high priority potential P3 projects should be maintained and re-evaluated on a regular basis.

(4) Recommendation 4: Consider the Potential P3 Benefits of a Transportation Revolving Loan Fund (RLF) For many projects involving partnerships between the private and public sectors, access to small, readily accessible loans could help fill key gaps in financing plans. When assessing the overall feasibility of this type of program, the State should also specifically consider the implications of such a program for future P3 initiatives.

(5) Recommendation 5: Engage Specialized Expert Assistance in the Development of a Transportation P3 Program In Maryland, consultants specializing in P3s have typically been engaged by state transportation agencies on a project-by-project basis. These experts have guided the State through the solicitation, evaluation, negotiation, and deal closure steps of specific P3 projects. However, their expertise has not yet been employed in the actual development of a comprehensive, forward-looking, statewide program for transportation P3s in Maryland. A longer term, program-level consultant relationship could be more cost effective than an ad hoc approach and could allow MDOT to respond to priorities more quickly. A consultant that is already fully familiar with the state transportation program and infrastructure goals could also provide invaluable insights during all implementation stages of specific P3 projects. Tasks could include, but are not limited to:

- Identification of P3 opportunities statewide
- Review and revision of existing TP3 process
- Development and implementation of preliminary screening analysis for P3 project concepts
- Evaluation and development of supplementary tools, such as a Transportation RLF
- Seamless guidance throughout various stages (feasibility analysis, solicitation, evaluation, negotiation, completion, ongoing oversight) of specific P3 projects